BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR TRANSFER NO. 73951 IN THE NAME OF MUD LAKE WATER USERS INC.	)	PRELIMINARY ORDER APPROVING IN PART AND DENYING IN PART APPLICATION FOR TRANSFER

SUMMARY OF PROCEEDINGS

On July 24, 2007, Mud Lake Water Users Inc. ("MLWU") filed with the Department of Water Resources ("Department") application for transfer no. 73951 to add a point of diversion to water rights 31-65, 31-329 and 31-331.

Notice of the application was published on January 31 and February 7, 2008, in the Times-News in Twin Falls, the Idaho Statesman in Boise, the Lewiston Tribune in Lewiston, and the Post Register in Idaho Falls. Notice of the application was also published on January 30 and February 6, 2008 in the Jefferson Star in Rigby. On February 19, 2008, protests to the application were timely received from the United States Fish and Wildlife Service ("USFWS"), Lyle R. Shupe ("Shupe"), Perry Woodard ("Woodard"), and Sidney G. Ashcraft ("Ashcraft").

On February 20, 2008, a Recommendation of Watermaster was received from Gregory Shenton, ("Shenton") Watermaster of Water District 31, indicating he did not oppose approval of the application because the pump is the last point of diversion on Camas Creek and would not cause injury to the existing water rights.

A prehearing conference was held on June 5, 2008, at the Department's Eastern Region, 900 N Skyline Dr. in Idaho Falls, Idaho. All parties were present except for Sid Ashcraft who was inadvertently not notified of the prehearing.

On October 24, 2008, Robert L. Harris, Attorney at Law, on behalf of MLWU, filed a Petition for Declaratory Ruling. The motion related to whether or not MLWU is required to file an application for transfer to add a point of diversion to its water rights in order to utilize a pump which recovers water from leaking gates that pass water through MLWU's dike ("dike") and which pumps stranded water from Camas Creek on the upstream side of the dike that would proceed downstream if the dike were not present.

Responding to the Petition for Declaratory Ruling, on January 7, 2009, the Department issued an Order Requiring Mud Lake Water Users Association to File an Application for Transfer to Add a Point of Diversion. The Interlocutory Order held that MLWU must file an application for transfer with the Department to provide for appropriate due process and issuance of a final decision on whether a pump on the upstream side of the dike can be added as a point of diversion to the water rights of MLWU and operated for the purpose of lifting leaked ground water and

natural flow surface water from the upstream side of the dike and discharging it into the backwaters of Mud Lake.

On January 27, 2009, a hearing was held at the Department's Eastern Region Office. Keith Shulberg, Shawn Grover, Peter Fisher, Dallas Furness were present on behalf of MLWU and were represented by Robert L. Harris, Attorney at Law. Woodard and Shupe were present and appeared pro se. The protestant Sid Ashcraft did not appear. The following witnesses testified at the hearing:

- Keith Shulberg ("Shulberg"), Director for MLWU
- Shenton, watermaster for Water District 31
- Ron Carlson ("Carlson"), Professional Engineer and Land Surveyor and retired Eastern Region Manager for the Department
- Woodard, protestant
- Shupe, protestant

At the hearing, the hearing officer admitted the following items into evidence.

Exhibit No.	Applicant's Exhibit
1	Map of Dike
2	Map of Dike & Mud Lake
3	Map of protestant's water rights
4	List of water rights for Lyle Shupe
5	List of water rights for Perry Woodard
6	Proof report of water right 31-262
7	Proof report of water right 31-267
8	Camas slough elevations

On August 27, 2009, a Notice of Proposed Default Order was mailed to Sid Ashcraft for not appearing at the date and time set for hearing in this matter. Based upon his failure to file a written petition requesting the default order not be entered, Sid Ashcraft was dismissed as a party to the contested case on September 3, 2009.

CASE SUMMARY

MLWU holds a number of decreed surface water rights for irrigation from Mud Lake and a number of water rights to pump ground water into Mud Lake. One place that MLWU pumps ground water is at the Bybee well field ("well field") located adjacent to Camas Creek between Rays Lake and Mud Lake. Ground water pumped at the well field is diverted into a small side channel and then injected into Camas Creek. The topography of the area around the well field is very flat, with only a slight grade towards Mud Lake. Consequently, injecting ground water pumped from the well field into Camas Creek changes the hydraulic head of Camas Creek near the well field, causing ground water to flow to both Mud Lake and back towards Rays Lake. To prevent the ground water from the well field from flowing into Rays Lake, over thirty seven years ago, the water users constructed a dike across the Camas Creek channel with six culverts equipped with gates that allow the water users to control the direction of flow. When MLWU

starts pumping ground water at the well field, the gates at the dike are closed. This directs the flow of ground water towards Mud Lake but also stops the continued flow of Camas Creek past the dike. About fourteen to sixteen years ago, MLWU installed a pump in the Camas Creek channel on the Rays Lake side of the dike and started pumping water over the dike into the backwaters of Mud Lake. At the time, Ron Carlson, Eastern Region Manager for the Department, gave his consent to the installation of the pump and did not require the filing of an application for transfer. But in 2006, after receiving an enquiry from a Rays Lake water right holder questioning the legality of the pump, a letter dated 18 July 2006 from Tim Luke, Water Distribution Manager, to Shenton, directed Shenton to cease further diversion by the pump at the dike until MLWU had taken the necessary steps to have the pump recorded as a point of diversion. In July 2007, MLWU filed application for transfer no. 73951, to add the pump as point of diversion on three of its water rights. The application was subsequently protested.

JURISDICATION AND AUTHORITIES

Idaho Code §42-222 states, in pertinent part:

> The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates....

The applicant bears the burden of proof for all of the factors listed in Idaho Code §42-222.

ISSUES PRESENTED

USFWS stated the proposed change is not in the local public interest because it may affect benefits to the public provided by USFWS. In the protest the USFWS stated the protest could be resolved by a condition establishing a minimum pumping elevation at the proposed point of diversion at approximately 4783.85 feet above mean sea level ("AMSL"), which corresponds to 13.9 feet on the new Rays Lake Bridge staff gage.

Woodard contends pumping water over the dike is an attempt to take Rays Lake water. It is his option MLWU should fix the leaking gates at the dike rather than add a point of diversion.

Shupe believes pumping water over the dike will cause a drop in Rays Lake and Sandhole Lake impacting the availability of stockwater from the two lakes and decreasing infiltration in the aquifer, lowering the water table and increasing costs of pumping water from the aquifer.

FINDINGS OF FACT

1. The protestant, Woodard, holds three decreed ground water rights and two decreed surface water rights from Rays Lake. The Rays Lake water rights are identified in the Department's records as 31-262 with a priority of January 27, 1914 and 31-267 with a priority of August 10, 1917. Combined these two rights authorize the diversion of 1.7 cfs for the irrigation of 76 acres and are supplemental to the two decreed ground water rights.

2. The protestant, Shupe, holds decreed right 31-2187 for stock water from Rays Lake and Sandhole Lake with a priority of January 26, 1916. A condition of this right states the quantity of water diverted shall not exceed 13,000 gallons per day.

3. Documents in the Department's records reveal Owsley Canal Company, Holley Canal Company and Jackett Canal Company reorganized in March 1998 to form MLWU. As a result of the reorganization, the water rights for MLWU consist of twenty six ground water rights, one wastewater right and forty four surface water rights diverted from Mud Lake. One of MLWU's surface water rights is 31-65 with a priority of October 3, 1910 for irrigation storage and irrigation from storage of 738 acre feet ("af") in Mud Lake.

4. Mud Lake is an on-stream storage reservoir at the downstream end of the Camas Creek drainage. Camas Creek naturally flows into Mud Lake and supplies water for storage rights with Mud Lake as the source. Camas Creek is also the primary source of water for Rays Lake and Sandhole Lake. Both lakes are located upstream from Mud Lake but also at the lower end of the Camas Creek Drainage on the Camas National Wildlife Refuge.

5. It appears from the U.S. Geologic Survey, Hamer Quadrangle map that water must be diverted from Camas Creek into Sandhole Lake. The map also shows the outlet of Sandhole Lake is at an elevation of at least 4788 feet AMSL and drains into Rays Lake.

6. Neither Rays Lake nor Sandhole Lake have a designated minimum lake level as provided by Idaho Code § 42-1503.

7. MLWU's Snake River Basin Adjudication ("SRBA") Claim to Water Right No. 31-327 is not associated with this transfer application, but documents submitted with this SRBA claim reveal in the early 1930's, numerous open discharge wells were drilled to augment the natural flow being stored in Mud Lake. Owsley Canal Company drilled several of these wells in the well field and perfected water rights for these wells authorizing the combined diversion of 200 cubic feet per second ("cfs"). The well water is collected in a channel which discharges into Camas Creek in the SW1/4SE1/4, Section 25, Township 07 North, Range 35 East, BM.

8. Prior to 1960, the natural flow in Camas Creek, not diverted by upstream water users, would flow unobstructed into Mud Lake. Due to flat topography of the area, if the natural flow in Camas Creek was high or the wells in the well field were pumping, the water level in Mud Lake would rise, backing up into Camas Creek and eventually begin filling Rays Lake.

9. Shulberg testified that during the 1960's a dike was constructed across the channel of Camas Creek in NW1/4SW1/4SE1/4, Section 25, Township 7 North, Range 35 East, BM as

illustrated in applicant's exhibit #1. The dike is just upstream from where the well field channel empties into Camas Creek.

10. Shulberg testified there are six sixty-inch diameter culverts extending through the dike. Five of the culverts were placed at the same lower elevation with the sixth culvert at a higher elevation. In the 1970s, gates were installed on the culverts. Presently each culvert is equipped with a Waterman screw gate.

11. When the dike gates are closed, the dike acts as a control structure directing ground water from the well field down Camas Creek into Mud Lake and preventing it from flowing up Camas Creek into Rays Lake. At the same time, the dike becomes a barrier blocking Camas Creek and stranding water behind the dike. Early in the year, the volume of water stranded behind the dike in Camas Creek is enough to raise the water level until it backs up into Rays Lake.

12. With installation of the gates, the practice was to close the gates either after Camas Creek no longer contributed inflow into Mud Lake because the hydraulic head was equal on both sides of the dike or when the flow in Camas Creek had to be supplemented with ground water from the well field to meet water user's demands.

13. Shulberg testified a pump was installed in 1996. The pump diverts water stranded in the Camas Creek channel on the upstream side of the dike and discharges it into the back waters of Mud Lake on the downstream side, contributing 400 to 500 af of water for storage in Mud Lake.

14. Carlson testified he gave his consent to the installation of the pump because in his opinion the pump was an upgrade to MLWU's delivery system which allowed them to recover water they were entitled to under their water rights. He did not require the filing of an application for transfer to add the pump as a point of diversion.

15. Shenton testified that from 1997 to 2007, when the demand for irrigation water diverted from Mud Lake exceeded the inflow from Camas Creek, he would close the gates on the dike, turn on the wells in the well field and turn on the pump to lift water over the dike.

16. By measuring the water in Camas Creek downstream from the dike with the pump on and the pump off, Shenton testified he determined the pump diverted between 11 to 12 cfs.

17. Shenton testified, when the water level on the Mud Lake side (downstream) of the dike is higher than on the Rays Lake side (upstream), water leaks through the closed gates into Camas Creek on the upstream side of the dike.

18. Often, when the wells in the well field are pumping, the culverts on the upstream side of the dike are submerged or partially submerged and any ground water leaking through the gates mingles with the stranded surface water inside the culverts. Lacking a measuring device or control structure to track the leaking ground water, it becomes inseparable from the stranded surface water.

19. USFWS protested the application for transfer on the basis it would injure water rights held by the USFWS and the proposed change was not in the local public interest.

20. MLWU and USFWS resolved the protest of the USFWS by agreeing to the following.

- The use of the dike pump by MLWU may only draw down the water level behind the dike to a level measured at 13.4 feet on the New Rays Lake staff gage.
- IDWR shall add the above condition to any water right listing the dike pump as a point of diversion.

21. Shenton testified the elevation readings on the new staff gage, installed on the upstream side of the dike, correspond to the elevation readings on the staff gage located at the Rays Lake Bridge in the southwest corner of the Camas Wildlife Refuge. The gage at the dike was installed to facilitate operation of the pump in compliance with the agreement between MLWU and USFWS.

22. Documentation provided by USFWS indicates 13.4 feet on the new Rays Lake staff gage equates to an elevation of 4783.35 feet AMSL.

23. Shenton testified there was three to four feet of water at the Rays Lake Bridge on May 8, 2008, and the water level was at 12.8 feet on the new staff gage. He stated at that level water goes all the way up the Camas Creek channel into Rays Lake. That same day he visited the Woodard pump and measured twenty inches of water above bottom of casing.

24. With a water level of 13.4 feet on the new Rays Lake staff gage there would be over two feet of water above the bottom of the casing on the Woodard pump.

25. The administration of surface water rights from Mud Lake and Camas Creek plus the ground water rights at the well field are under the control of the watermaster for Water District 31.

ANALYSIS

Prior to construction of the dike, the natural flow in Camas Creek below the last diversion for the USFWS flowed unobstructed into Mud Lake to become storage for irrigation. Depending on the volume of spring run off the backwaters of Mud Lake could extend up the Camas Creek channel into Rays Lake. Construction of the dike across the Camas Creek channel in the 1960s allowed for better control of ground water pumped from the well field and discharged into Camas Creek by directing it into Mud Lake. However, the dike also blocked the flow of Camas Creek. With the gates in the dike closed, the flows in Camas Creek could only accumulate behind the dike causing water to backup the channel and increase the water level in Rays Lake. In 1996, to augment the storage in Mud Lake, MLWU installed a pump to lift the stranded water over the dike allowing it to continue down Camas Creek. Though MLWU correctly asserted the pump diverted stranded water in Camas Creek that MLWU was entitled to and received as part of their storage rights prior to construction of the dike, because the stranded water must be pumped over the dike and the pump is in Camas Creek, a natural channel in which water rights are regulated

by the watermaster for WD31, at this time, it is the Department's position the pump constitutes a point of diversion and should be authorized under MLWU's water right(s).

Typically, the Department describes water rights for storage as being either on-stream or off-stream. When Camas Creek water is flowing unobstructed into Mud Lake, the storage of water in the lake is characterized as on-stream storage. Prior to approval of this transfer application, water right 31-65 is an example of an on-stream storage right. However in this transfer, with the unique situation of the watermaster needing to regulate both the pump which diverts water to storage (off-stream) and the head gates in Mud Lake which take water from storage (on-stream), water right 31-65 will become a hybrid with the elements of both off-stream and on-stream storage. The pump, which is in the NW1/4SW1/4SE1/4, Section 25, Township 7 North, Range 35 East, BM, will be identified as the point of diversion. The rate water is diverted by the pump is described as diversion to storage which has a season of use limiting when water can be diverted. The source of water for diversion to storage is Camas Creek tributary to Mud Lake. Where the pumped water is injected back into Camas Creek on the other side of the dike is described as a point of injection and has the same legal description as the point of diversion. The injected water becomes irrigation storage in Mud Lake. The four canals previously identified as points of diversion on water right 31-65 will be designated as points of rediversion. With the partial approval of the transfer application, these elements will be added to water right 31-65.

To provide for recovery of ground water that has leaked through the screw gate, the application also requests the pump be added as a point of diversion to two of MLWU's ground water rights. However, when the water level on the upstream side of the dike is at or above 13.4 feet on the staff gage the culverts on the upstream side are partially submerged and ground water leaking through the gates mixes with the stranded surface water inside the culvert. Because there is no way for the watermaster to control the leakage or measure the ground water before it mixes with the surface water, any ground water leaking through the gates is recognized as simply contributing to the volume of water stranded on the upstream side of the dike. Therefore, adding the pump as a point of diversion or rediversion on the ground water rights is not appropriate.

Because the pump is recovering Camas Creek water to which MLWU is entitled under their water rights, the act of pumping water over the dike will not injure other water rights. Moreover by entering into the stipulation with the USFWS and agreeing to not pump water below an elevation of 4783.35 feet AMSL or 13.4 feet on the staff gage at the dike, water stranded on the upstream side of the dike will be backed up into Rays Lake and available for use under other water rights diverted from Rays Lake. The outlet for Sandhole Lake is some 5 feet higher than 4783.35 feet AMSL, so water flowing from Sandhole Lake is not affected by operation of the pump.

Prior to 2007, the watermaster calculated the capacity of the pump by measuring the flow in the Camas Creek channel below the dike with the pump off and with the pump on. However, with a measuring device at the pump, the watermaster can monitoring the rate of diversion and calculate the volume of water being diverted. With this information, the watermaster can regulate the delivery of water right 31-65 to ensure there is no enlargement in either the rate of diversion or the volume of water diverted to storage.

The use of water on the lower end of Camas Creek for the purpose of irrigation storage in Mud Lake is a long accepted practice dating back to 1910 under water right 31-65. Continuing this practice is consistent with the conservation of water resources within the state of Idaho.

There is no conflict with the local public interest, because the eventual use of the water diverted under 31-65 continues to be irrigation in an area that is primarily agricultural. To protect the public interest values asserted by the USFWS, use of the pump is guided by the stipulation between MLWU and USFWS which specifies the pump will be turned off when the water level on the upstream side of the dike is at or below an elevation of 4783.35 feet AMSL, or 13.4 feet on the recently installed staff gage at the dike.

Approval of the application to transfer 31-65 will not adversely affect the local economy because the water is not being transferred outside of the local area or watershed where the source originates.

CONCLUSIONS OF LAW

1. Without a method to determine or measure the volume of ground water leaking through the gates, the watermaster can not accurately access the total volume of water eligible for rediversion under water rights 31-329 and 31-331 in a manner that will ensure neither right is being enlarged.

2. Approval of the application to transfer water right 31-65 will not injure existing water rights if it is limited to allow MLWU to recover water which it is entitled to under its water right.

3. Approval of the application to transfer water right 31-65 will not injure existing water rights because limiting the diversion of water to periods when the water level on the upstream side of the dike is at 13.4 feet or higher on the new Rays Lake staff gage leaves water in Rays Lake for diversion under other water rights.

4. With the installation of a measuring device, the watermaster can monitor the volume of water diverted from Camas Creek to prevent enlargement of the water right 31-65.

5. Continuing the historical practice of using water at the lower end of Camas Creek for irrigation storage in Mud Lake is consistent with the conservation of water resources in the state of Idaho.

6. The change requested by the transfer application for water right 31-65 will not conflict with local public interest as defined in section 42-202B, Idaho Code because the use of water continues to be irrigation in a primarily agricultural community. Public interest values asserted by USFWS were addressed in a stipulation between USFWS and MLWU.

7. The change requested by the transfer application for water right 31-65 will not adversely affect the local economy because the water right will continue to be used for irrigation with no change in the place of use

8. Application for transfer no. 73951 should be approved with conditions for water right 31-65 and denied for water rights 31-329 and 31-331.

ORDER

IT IS HEREBY ORERED that the addition of a point of diversion to water rights 31-329 and 31-331 as requested by application for transfer no. 73951 is **Denied,** the addition of a point of diversion to water right 31-65 as requested by application for transfer no. 73951 is **Approved,** subject to the conditions listed below.

1. This right is limited to the irrigation of 160 acres within the place of use described above in a single irrigation season.

2. Place of use within the boundary of the Owsley Division of Mud Lake Water Users, Inc. total irrigated acres 17818.

3. The boundary encompassing the place of use for this water right is described with a digital boundary as authorized by Idaho law. The data comprising the digital boundary are stored in the electronic document management system of the Department and are incorporated into this approval by this reference. A map depicting the place of use is attached to this approval document to illustrate the place of use described by the digital boundary.

4. Use of the rights listed below is limited to the irrigation of a combined total of 24261.3 acres in a single irrigation season. Combined right nos.: 31-327, 31-328, 31-329, 31-330, 31-331, 31-332, 31-336B, 31-337B, 31-371, 31-2239, 31-2265, 31-2289, 31-2290, 31-2297, 31-2310, 31-2317A, 31-2317B, 31-2321, 31-2341, 31-2342, 31-2343, 31-2344, 31-2345, 31-7005, 31-11430, 31-11432, (Groundwater), 31-2276, (Wastewater), 31-6, 31-34, 31-35, 31-36, 31-37, 31-38, 31-52, 31-65, 31-104, 31-105, 31-147A, 31-159, 31-162, 31-163, 31-166, 31-168, 31-169, 31-184, 31-185, 31-186, 31-187, 31-188, 31-232, 31-237, 31-263, 31-363, (Owsley Division Surface Water), 31-134, 31-135, 31-143, 31-144, 13-190, 31-192, (Jackett Division Surface Water), 31-344, 31-345, 31-354, 31-355, 31-360, 31-361, 31-10957, 31-10958, 31-10959, 31-10960, 31-10961, 31-10962 (Holley Division Surface Water).

5. Use of water under this right will be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 31, Mud Lake and tributaries.

6. The right holder shall maintain a measuring device and lockable controlling works of a type approved by the Department in a manner that will provide the watermaster suitable control at the point of diversion and at the points of rediversion.

7. Diversion of water at the point of diversion in the NW1/4SW1/4SE1/4, Section 25, Township 7 North, Range 35 East, BM may only draw down the water in Camas Creek to a level of 13.4 feet measured on the New Rays Lake staff gage located in the Camas Creek Wildlife Refuge at the Rays Lake Bridge in the SW1/4NE1/4SE1/4, Section 25, Township 7 North, Range 35 East, BM.

8. The administration of this water right is also subject to the agreement of water right owners regarding Mud Lake Water delivery dated April 17, 2001, which is on file in the records of the clerk and recorder of Jefferson County, Idaho, Instrument Number 307626.

9. For this right, the diversion volume described above was calculated by multiplying a diversion rate of 3.0 cfs by a factor of 2 acre feet per day for 123 days (May 1st to September 1st).

10. The right holder shall accomplish the change authorized by this transfer within one year of the date of this approval.

11. Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.

12. Pursuant to Section 42-1412(6), Idaho Code, this water right is subject to such general provisions necessary for the definition of the rights or for the efficient administration of water rights as may be determined by the Snake River Basin Adjudication court at a point in time no later than the entry of the final unified decree.

Dated this 18 day of September 2009.

Ernest Carlsen

Ernest Carlsen
Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that on **September 18, 2009** I mailed a true and correct copy, postage prepaid, of the foregoing **PRELIMINARY ORDER (Transfer Approval)** to the person(s) listed below:

RE: Transfer 73951

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